LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 23 1969
JOHN F. DAVIS, CLERK

No. 503

In the

Supreme Court of the United States

OCTOBER TERM A.D. [redacted] 1969

HAROLD SAWYER and SAM EHRENBERG,
Petitioners.

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

ARTHUR E. ENGELLAND
11 South LaSalle Street
Chicago, Illinois

ROBERT S. BAILEY
53 West Jackson Boulevard
Chicago, Illinois
Attorneys for Petitioners

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	10
APPENDIX	1a

CITATIONS

CASES

United States v. Ventresca, 380 U.S. 102	7, 8
Spinelli v. United States, 393 U.S. 410	8, 9
Aguilar v. Texas, 378 U.S. 108	9
Nathanson v. United States, 290 U.S. 41	9
Wong Sun v. United States, 371 U.S. 471	9

CONSTITUTIONAL PROVISIONS

4th and 14th Amendments to the United States Constitution	2, 3, 5, 7, 9

STATUTES

Illinois Revised Statutes, Chapter 38 Section 28-1 (a) (5)	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM A.D. 1968

No.

HAROLD SAWYER and SAM EHRENBERG,
Petitioners.

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Your Petitioners, Harold Sawyer and Sam Ehrenberg, respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered March 27, 1969, rehearing denied May 27, 1969, affirming the judgments of conviction of Petitioners previously entered in the Circuit Court of Cook County, Illinois.

OPINION BELOW

The opinion of the Supreme Court of Illinois dated March 27, 1969 is reported at 42 Ill. 2d 294. It is reprinted herewith as Appendix A. There was no opinion in the trial court.

JURISDICTION

Petitioners Harold Sawyer and Sam Ehrenberg, were convicted in the Circuit Court of Cook County, Criminal Division, of the offense of gambling. Ehrenberg was admitted to probation upon that conviction for a period of 5 years and Sawyer was sentenced to incarceration in the State Penitentiary for a period of not less than one year nor more than one year and one day. On direct appeal to the Supreme Court of Illinois the judgments of conviction were affirmed as to each of Petitioners. That Court, however, vacated the sentence imposed upon Petitioner Sawyer and remanded the cause as to him to the Circuit Court of Cook County for re-sentencing. A Petition for Rehearing was filed on behalf of both Petitioners and denied by the Supreme Court of Illinois on May 27, 1969. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1257(3).

QUESTION PRESENTED

Should Petitioners' motion to suppress evidence and to quash the search warrant have been granted because the complaint upon which that warrant was issued is constitutionally insufficient in that no probable cause was cited to support the particular description of the premises to be searched?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, sup-

ported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14:

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law * * *

Illinois Revised Statutes

Chapter 38 Section 28-1 (a) (5)

(a) A person commits gambling when he: . . .

(b) Knowingly owns or possesses any book, instruments or apparatus by means of which bets or wagers have been, or are, recorded or registered * * *

STATEMENT

On October 28, 1965, a search warrant was issued upon the Complaint of Duncan Everette, an FBI agent. A. 29[1] Executing that warrant, Agent Everette and several officers of the Chicago Police Department went to 4246 North Sheridan Road in Chicago, an apartment hotel containing a large number of dwelling units, and entered Room 409 at that address. A. 14. They found and seized certain documents which, the officers testified, were records of gambling transactions. A. 17, 18. Petitioners, both of whom were on the premises at the time the officers appeared, were arrested.

---

[1] The entire record consists of the complete record of the proceedings in the Supreme Court of Illinois as prepared by the Clerk of that Court including two volumes of the record prepared by the Clerk of the Circuit Court of Cook County, Criminal Division filed in the Supreme Court of Illinois. For references to the record, we have used the notation R. In addition to the complete record, however, we have transmitted to the Clerk of this Court, several copies of the Abstract of Record filed by Appellants in the Supreme Court of Illinois, for references to which we have used the notation, A. That Abstract has been included in the complete record as Document No. 17.

The sworn complaint upon which the warrant was issued is reprinted in its entirety on page 28 of our Abstract filed in the Supreme Court of Illinois. We point out only that the probable cause upon which the Agent stated that his complaint rested did not include any mention of Room 409 at the 4246 North Sheridan Road address, nor were facts set forth to indicate that the activity of which he complained was taking place in that apartment as opposed to any other apartment at the same address. A. 28. The informers, upon whose information the complaint really rested, provided the Agent with a telephone number. They gave him neither address nor any name save "Harold". The Agent obtained the address by his determination that the records of the Illinois Bell Telephone Company revealed that the appropriate telephone was listed to 4246 North Sheridan Road in the name not of Harold Sawyer or of Sam Ehrenberg, but of one Harold S. Laurey. A. 28. The telephone listing, according to the Agent's affidavit, did not reveal the particular apartment at that address in which the phone was installed. Upon that showing a search warrant was issued by the magistrate commanding a search of premises of room 409 at 4246 North Sheridan Road. A. 29.

Upon motion on behalf of defendants to suppress evidence and to quash the warrant, a brief hearing was held at which the only evidence presented concerned the nature of the premises. A. 11. It established that 4246 North Sheridan Road is a multiple dwelling apartment hotel. A. 11, 14. Although the hearing afforded an opportunity, no evidence was offered on behalf of the State to prove that Agent Everette, the complainant, had given any additional information to the magistrate, under oath, which would establish probable cause to search room 409, nor

did the State offer any evidence that either of the defendants was or had ever been known as Harold Laurey. A. 11-13.

Following the denial of defendants' motion, the cause was tried to jury which resulted in a verdict of guilty as to both of the defendants. On that verdict Petitioner Ehrenberg was admitted to probation for a period of five years. A. 31. Petitioner Sawyer, on the other hand, was sentenced to incarceration in the state penitentiary for a period of not less than one year nor greater than one year and one day. A. 31. On appeal to the Supreme Court of Illinois, the convictions of each of Petitioners were affirmed. The sentence imposed upon Petitioner Sawyer, however, was vacated and the cause as to Sawyer was remanded to the Circuit Court of Cook County, Criminal Division for re-sentencing in accordance with the opinion of the Supreme Court of Illinois, per Mr. Chief Justice Solfisburg. App. A.

REASONS FOR GRANTING THE WRIT

It is the fundamental contention of Petitioners herein that the motion advanced on their behalf to quash the search warrant and suppress the evidence seized by the officers pursuant to the warrant should have been granted. We concede that the warrant itself met the requirements of the Fourth Amendment to the Constitution of the United States in that the premises to be searched were particularly described therein. A. 29. The references in the warrant to room 409, at 4246 N. Sheridan Road, Chicago, Illinois could hardly be more explicit. The vice of these proceedings, however, lies in the fact that nowhere in the complaint upon which the warrant was issued does the complaining agent ever state probable cause to support

a description of such particularity. Petitioners contend in short that the warrant is not supported by the complaint upon which it was issued.

In his complaint, Agent Everette stated his probable cause for the issuance of the warrant as follows:

> "On October 20, 1965 and October 27, 1965, two informers, who have furnished reliable information to me in the past concerning gambling matters, told me they had recently called race horse bets into Chicago telephone 477-6667 and placed their bets with a man called "Harold," who answered on the other end. These informers said they called this number and placed bets on October 20, 1965 and October 27, 1965. These informers furnished this information separately, and neither informer knows the identity of the other as an informer. I determined the records of the Illinois Bell Telephone Company reveals Chicago telephone 477-6667 as listed to Harold S. Laurey, 4246 N. Sheridan Road, Chicago, Illinois.
>
> At 12:50 p.m. on October 27, 1965 I personally dialed telephone 477-6667 and placed a $10 bet with a man named Harold with a horse named Hockabee to win the third race at Sportsman Park on October 27, 1965." A. 28.

It is significant that nowhere in the foregoing statement of his probable cause did Agent Everette mention room 409 or any other room in the multiple dwelling, apartment hotel, located at 4246 N. Sheridan Road. What then is there to support the issuance of a warrant for the search of those particular premises? On what basis could the magistrate who issued the warrant on the foregoing complaint, make an independent judicial determination that probable cause existed for the search of the particular premises described in the warrant?

Our contention then is not that too much discretion in the execution of the warrant was left to the police officers but rather that no independent judicial judgment was exercised in determining the precise, particular described place to be searched. We think the Fourth Amendment requires that the identification of the premises to be searched rest upon such an independent judicial determination based upon a showing of probable cause before the magistrate. This complaint is deficient in that regard.

We point out in addition that at the hearing on the motion to quash defendants presented evidence of the nature of the premises at 4246 N. Sheridan Road. The State presented no evidence that Agent Everette or anyone else ever made any statement orally or in writing constituting probable cause to believe that gambling activities were taking place in room 409 at that address, as opposed to any other particular room or apartment in that multiple dwelling unit. There was no showing that any such information was made available to the magistrate, nor was there any statement indicating that such information was available to the complainant when he applied for the warrant. If a warrant particularly describing premises to be searched may issue upon a complaint which does not describe those premises, what, indeed, is left of the constitutional command of the Fourth Amendment that "No warrant shall issue but upon probable cause supported by oath or affirmation"? There is no statement anywhere in the record of this case of any reason the complainant had to believe that gambling activity was being carried on or gambling paraphernalia was located in room 409. Certainly there was no such statement supported by oath or affirmation.

The Supreme Court of Illinois in affirming relied upon this Court's decision in *United States* v. *Ventresca*, 380

U.S. 102. The significant language, in the opinion of the Chief Justice Solfisburg, is as follows:

> "So here, the logical interpretation is that affiant had made an investigation from which the room number was obtained, for otherwise the number could not have been stated. The failure to incorporate the number in the portion of the sworn complaint reciting the investigation does not render the complaint involved." App. A. 3a.

We note that that opinion, however, neither cites nor discusses this Court's opinion dated January 27, 1969 in *Spinelli* v. *United States,* 393 U.S. 410, although that opinion was explicitly called to the court's attention on Petition for Rehearing. R. 24.

Applied to the facts of the instant case, we think that *Spinelli* requires more than simply a "logical interpretation" that a law enforcement agent had made "an investigation from which the room number was obtained". We think *Spinelli* requires that the magistrate be advised under oath of the underlying circumstances of that investigation, *e.g.,* what if anything the agent saw or heard personally, from whom he obtained what hearsay information he had, and whether or not his informants were in a position to relate to him the underlying factual basis for their hearsay conclusions.

Although we recognize the holding of *Ventresca* that search warrants and the complaints upon which they are based are not to be read in a hypertechnical manner and we have no quarrel with the principle that such documents are to be construed in a common sense fashion with due regard for the circumstance that they are generally drafted not by lawyers or judges but rather by investigators in the exigencies of criminal investigations, we submit that

this complaint simply does not contain any statement of any cause whatever to search room 409 at 4246 N. Sheridan Road. That much, at least, we respectfully submit, is required by the Fourth Amendment as well as by the previous decisions of this court in *Aguilar* v. *Texas,* 378 U.S. 108, and *Nathanson* v. *United States,* 290 U.S. 41, in addition to *Spinelli.*

Yet another significant decision of this court which ought to be applied to the facts of the case at bar is *Wong Sun* v. *United States,* 371 U.S. 471. There this Court held constitutionally insufficient a description of a named individual as the proprietor of a laundry located at Leavenworth Street in San Francisco. Such description, the opinion stated, did not meet the Fourth Amendment's requirement of particularity. The *Wong Sun* decision, we contend, provides additional constitutional support for our position here that the particularity of the description of the premises to be searched set forth in a search warrant, must be supported, somewhere in the record, by probable cause made known, under oath or affirmation, to an independent judicial officer prior to the warrant's issuance. The absence of such a statement is the constitutional infirmity in the complaint upon which this warrant was issued.

In view of the repeated emphasis in the opinions of this Court upon the importance of the Fourth Amendment's constitutional interposition of the judgment of a disinterested judicial officer between citizen and policeman, we believe that the Supreme Court of Illinois has decided an important question of constitutional law in a manner which gives insufficient weight to the previous opinions of this Court and further, that the court below has decided that question in a way probably not in accord with the applicable decisions of this Court.

CONCLUSION

For the reasons expressed above we believe this cause worthy of review in this Court. We respectfully petition this Court to issue its Writ of Certiorari to the Supreme Court of Illinois.

Respectfully submitted,

ARTHUR E. ENGELLAND
11 South La Salle Street
Chicago, Illinois

ROBERT S. BAILEY
53 West Jackson Blvd.
Chicago, Illinois
Attorneys for Petitioners

August, 1969.

APPENDIX A

Docket No. 40286—Agenda 2—January, 1969.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. HAROLD SAWYER *et al.*, Appellants.

MR. CHIEF JUSTICE SOLFISBURG delivered the opinion of the court:

The defendants, Harold Sawyer and Sam Ehrenberg, were tried by jury in the circuit court of Cook County and found guilty of the crime of gambling. Sawyer was sentenced to the penitentiary for a term of not less than one year nor more than one year and one day and Ehrenberg was placed on probation for a period of five years. Each defendant has appealed.

The defendants first claim is that a sworn complaint for a search warrant was insufficient because it did not refer to the room number of an apartment in a multi-unit building. The sworn complaint for the warrant requested its issuance to search Room 409 at 4246 North Sheridan Road, Chicago, and the warrant itself directed a search of that room. However, the facts stated in the complaint to establish probable cause for the issuance of the warrant did not mention the room number and were substantially as follows: On two separate occasions two informers who had previously furnished reliable information to the affiant, an FBI agent, told affiant that they had recently called race horse bets into a certain telephone number and placed their bets with a man named "Harold". Affiant stated that he determined that the records of the telephone company revealed that this number was listed to Harold S. Laurey, 4246 North Sheridan Road, and affiant further stated that he personally called the number and placed a bet with a man named Harold. It was brought out at the hearing on the motion to quash the warrant and suppress the evidence, that the building at this address was a seven or eight-story

building containing many rooms and apartments. The defendant admits the sufficiency of the warrant but claims that the facts stated in the sworn complaint were an insufficient basis for the issuance of the warrant to search Room 409. We do not agree.

In *United States* v. *Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741, the court granted *certiorari* to review the standards by which a reviewing court should approach the interpretation of affidavits supporting warrants which have been duly issued by examining magistrates. The court reviewed prior decisions which strongly supported a preference for a search under a warrant and pointed out that in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall. The court pointed out that affidavits for search warrants were normally drafted by nonlawyers in the haste of a criminal investigation and must be tested in a common-sense and realistic fashion and that courts should not invalidate a warrant by interpreting the affidavit in a hypertechnical manner. Although the issue in the *Ventresca* case was not the sufficiency of the description of the place to be searched, the reasoning and language are applicable here. The affidavit herein, the sworn complaint, stated the name of the party in whom the telephone was listed and gave the street address. The agent obviously had checked and found the room number, for it was stated in the complaint and in the warrant. The situation is analogous to that in *People* v. *McGrain,* 38 Ill. 2d 189, where an affidavit was attacked on the basis that the facts stated were not based upon the personal observation of the affiant. While the affidavit did not positively state that affiant had personally observed certain facts on a certain date, the court construed the language in a common-sense manner and said that this was the only logical interpretation. So here, the logical interpretation is that affiant had made an investigation from which the room number was obtained, for otherwise the number could not have been stated. The failure to incorporate the number in the portion of the sworn complaint

reciting the investigation does not render the complaint invalid.

Defendants also argue that the evidence was insufficient to establish their guilt. Police officers testified that they found documents in the apartment which were of the type used in the business of taking wagers, including a record of bets received; that the defendants were the only two occupants of the room; and that each defendant had a key to the room in his possession. There were two telephones in the room and during a period of about twenty minutes while the officers were in the room, two of them answered the phones and accepted numerous bets. This is clearly not a case where a defendant has been found guilty merely because he was in the vicinity of a crime. The evidence that the defendants were the only people in the room, that they each had a key to the room and that a record of bets was found in the room, coupled with evidence of the phone calls, was sufficient to establish that the defendants possessed apparatus by means of which bets and wagers were recorded. Ill. Rev. Stat. 1965, chap. 38, par. 28—1(a)(5).

At the trial the officers who testified as to the telephone calls were permitted to refer to notes of the contents of the calls and these notes were later admitted in evidence. The defendants do not argue that evidence of the phone calls was inadmissible, but object to the fact that the officers were permitted to read from their notes and that these notes were admitted in evidence. At the trial, however, counsel objected to the admission of this evidence on the ground that it was outside the presence of the defendants, an objection which was apparently based upon the hearsay rule. The court overruled that objection and counsel made no objection to the officers referring to the notes. The objection is now urged on an entirely different basis from the objection in the trial court and, since it was not made there, it will not be considered here. When the State offered all its exhibits the court asked the defendants' counsel if he wanted to be heard and counsel stated that the court could note his objection. The court then proceeded to consider all

of the State's exhibits and no further objection was made, although at the conclusion of the offer of each exhibit the court stated, "Objection overruled." We do not believe that the general objection to the admission of all the exhibits, made prior to their offer in evidence, was sufficient to preserve the question of their admissibility, and we therefore do not consider defendants' argument that the notes should not have been admitted in evidence. In any event, they were not taken to the jury room and the fact that they were admitted in evidence could not have prejudiced the jury, since the jury heard all the evidence which was contained in the notes.

The court ruled that certain defense exhibits were inadmissible. These exhibits were reports that the arresting officers had filed after the arrest and search, and if admissible at all, were only admissible to impeach the witnesses. They were furnished to defense counsel for his use in attempting to impeach the testimony of the officers and were in his possession during his cross-examination. In the cross-examination of one officer the witness said that he did not talk to the defendants at the time of their arrest and counsel brought out that in the officer's written report he stated that the defendants admitted to being operators of a "wire room", which the officer said was a center for taking horse race bets. This was the only attempt to prove that a witness had made a prior inconsistent statement and it seems clear that the defendants were not prejudiced by the court's ruling that the reports were not admissible.

The defendants also contend that the prosecutor's final argument was improper. At one point in the argument, the prosecutor stated that no testimony had been presented to dispute the testimony of the officers. Counsel objected, stating that it was not incumbent upon him to present any testimony, and the court sustained the objection. At another point the prosecutor referred to the large number of bets that were received by the officers and asked the jurors whether they would condone this type of conduct. The defendants objected stating that conduct was not on trial and

the court overruled the objection. The defendants argue that the first instance referred to amounted to a comment on the failure of the defendants to testify. While it is conceivable that the statement of the prosecutor could be subject to that interpretation and the remark would have been better left unsaid, we are of the opinion that in view of the prompt objection and the court's prompt ruling, there was no prejudicial error. The other instance complained of was proper argument, since it is permissible to refer to the nature of the crime and comment on the conduct of the accused. *People* v. *Brown,* 16 Ill. 2d 482.

We turn now to the final contention which pertains to Sawyer only. At the time of sentencing the court made the following remarks:

"Furthermore, their entire attitude, particularly Sawyer's, from the time of the arrest has been one of a complete lack of cooperation. I am not penalizing anyone for taking a jury trial, but I don't think they are entitled to any consideration as a defendant is who comes in and pleads guilty and is honest with the Court. I have given them an opportunity to have their say." Somewhat later in imposing the sentence the court said, "This case, I assume, will go up to a higher court. I think it is high time the whole question of penitentiary and County Jail should be tested. That is the only reason I am going to—Harold Sawyer, the Court sentences you to the Illinois State Penitentiary a minimum term of one year, a maximum term one year and one day." We are of the opinion that this sentence cannot be permitted to stand. In spite of the judge's protestation that he was not penalizing the defendant for taking a jury trial, it seems clear that in fact he did just that. His later remark can only be interpreted to mean that the only reason he sentenced the defendant to the penitentiary was to get an opinion from this court as to whether the crime with which the defendant was charged subjected defendant to such imprisonment. Some confusion on this question was created by certain amendments to the gambling statute enacted by the legislature in 1965. The confusion was dispelled by this

court in *People* v. *Chatman*, 38 Ill. 2d 265, but had not been resolved at the time of this trial. One who is sentenced to the penitentiary only for the reason that the judge wants a test case has not been fairly sentenced.

The judgment of conviction of each defendant is affirmed. As to the defendant Sawyer, the sentence is vacated and the cause is remanded to the trial court for a new sentence in accordance with the views expressed herein.

Affirmed in part, and vacated in part and remanded.

MR. JUSTICE WARD took no part in the consideration or decision of this case.